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No. 94-1354

In the Supreme Court of the United States

OCTOBER TERM, 1994

GRAHAM L. COLE, PETITIONER

v.

DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether regulations that create a rebuttable presumption that a dealer in tobacco has participated in marketing tobacco in excess of marketing quotas when the dealer has failed to report the source of tobacco sold or has reported that he has sold more tobacco than he has purchased, are valid.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A29) is reported at 33 F.3d 1263. The order of the district court (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1994. A petition for rehearing was denied on November 9, 1994. Pet. App. C1-C2. The petition for a writ of certiorari was filed on February 7, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Adjustment Act of 1938, 7 U.S.C. 1281 *et seq.*, accords "farmers * * * Federal assistance to control effectively the orderly marketing" of tobacco by fashioning a complex system for creating, applying, and regulating a "national marketing quota" for tobacco. 7 U.S.C. 1311(a), 1312. The Act directs the Secretary of Agriculture to proclaim a "national marketing quota" for each kind of tobacco, 7 U.S.C. 1312, to be apportioned among the States, 7 U.S.C. 1313(a), and in turn to be apportioned as a tobacco allotment—or quota—to each tobacco producing farm, 7 U.S.C. 1313(b). The Secretary has promulgated a comprehensive regulatory scheme for determining tobacco farm marketing quotas. See 7 C.F.R. Pts. 723-726.[1] The marketing quotas are administered by the Secretary through the Agricultural Stabilization and Conservation Service (ASCS). 7 C.F.R. 2.65(a)(1).

Congress provided that "[t]he marketing of * * * any kind of tobacco in excess of the marketing quota for the farm on which the tobacco is produced * * * shall be subject to a penalty." 7 U.S.C. 1314(a). The penalty "shall be paid by the person who acquires such tobacco from the producer but an amount equivalent to the penalty may be deducted by the buyer from the price paid to the producer." *Ibid.* Congress also directed that "[t]he Secretary shall prescribe such regulations as are necessary for the enforce-

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[1] The parties agreed that the regulations found in the 1989 edition of the Code of Federal Regulations applied at all times relevant to this case. See Pet. App. A3 n.1. Therefore, all citations to the Code of Federal Regulations in this brief refer to the 1989 edition.

ment" of the Agricultural Adjustment Act. 7 U.S.C. 1375(b).

To monitor the problem of marketing in excess of quotas and to enforce the statutory penalty provisions, the Secretary has promulgated regulations that impose stringent recordkeeping and reporting requirements upon producers and dealers.[2] Each producer receives a "marketing card" each year that indicates the producer's quota. 7 C.F.R. 725.87(a)(1), 726.81(a)(1).[3] When the producer makes a sale, the quantity of the sale is noted on the card. 7 C.F.R. 725.91(a), 726.85(a). In addition, dealers themselves must "keep a record and make reports * * * showing all purchases and resales of tobacco made by or for the dealer." 7 C.F.R. 725.100(c)(1), 726.94(c)(1). The dealer's reports must indicate, for each lot of tobacco purchased or sold, the name and identification number of the seller or buyer of the tobacco, the date of the transaction, the number of pounds in the purchase, the amount of the penalty collected (if applicable), and other information used to enforce the tobacco quotas. 7 C.F.R. 725.100, 726.94.

The regulations protect against producers' marketing in excess of their quotas by ensuring that dealers will account for all purchases and remit or collect

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[2] A dealer is a "[a] person who engages to any extent in acquiring or selling tobacco in the form normally marketed by producers." 7 C.F.R. 725.51(g); see also 7 C.F.R. 726.51(f).

[3] The regulations are divided by type of tobacco marketed. Flue-cured tobacco is regulated by 7 C.F.R. Pt. 725. Burley tobacco is regulated by 7 C.F.R. Pt. 726. The burley regulations are identical to the flue-cured regulations in relevant respects. The majority of the tobacco at issue in this case was flue-cured.

the penalty amount that is appropriate. To that end, the Secretary has promulgated a series of regulations that ensure the effective assessment, collection, and possible return of a penalty. See 7 C.F.R. 725.92-725.97, 726.86-726.91. As relevant herein, among the "[p]enalties considered to be due from warehousemen, dealers, buyers, and others excluding the producer," 7 C.F.R. 725.94, 726.88, are:

> (d) *Dealer's tobacco.* The * * * tobacco resales by a dealer (as shown or due to be shown on [the reporting form]), which are in excess of his total prior * * * tobacco purchases (as shown or due to be shown on [the reporting form]) shall be considered to be a marketing of excess tobacco and penalty thereon shall be due at the time the marketing takes place which results in the excess. * * *
>
> (e) *Resales not reported.* Any resale of tobacco which is required to be reported by a warehouseman or dealer, but which is not so reported within the time and in the manner required, shall be considered to be a marketing of excess tobacco, unless and until such warehouseman or dealer furnishes a report of such resale which is acceptable to the State executive director. The penalty thereon shall be paid by the warehouseman or dealer who fails to make the report as required.

7 C.F.R. 725.94(d) and (e), 726.88(d) and (e).

2. Petitioner, a tobacco dealer, bought and sold tobacco during the marketing years of 1985-1986, 1986-1987, and 1987-1988. Pet. App. B2. On March 6, 1990, petitioner was notified by the Georgia Agricultural Stabilization and Conservation (ASC) Committee that an examination of records submitted by

petitioner and by dealers who had purchased tobacco from petitioner indicated that more tobacco had been sold under petitioner's dealer number than petitioner had reported as purchased. The notice informed petitioner that he was therefore being charged with the sale of excess tobacco in three separate marketing years. Demand was made upon petitioner for $398,756.59, the amount due for the purchases for which petitioner had not accounted. *Id.* at B1-B2.

After an evidentiary appeal hearing before the Georgia ASC Committee, petitioner was notified that the assessment had been affirmed. Pet. App. B25-B36. Petitioner appealed that decision to the Deputy Administrator for State and County Operations of the Department of Agriculture in Washington, D.C. On December 17, 1990, the Deputy Administrator denied the appeal, upholding the Georgia ASC Committee determination and assessment. *Id.* at B6-B11.

3. Petitioner initiated this action in district court, challenging the assessment against him on various grounds. The district court granted summary judgment in favor of petitioner on the sole ground that no statute "authorizes the assessment of penalties on dealers for the oversale of tobacco, that being the type of penalty here being imposed by [respondents] on [petitioner]." Pet. App. B2.

4. The court of appeals reversed. Pet. App. A1-A29. The court explained that, under the relevant regulations, "when a tobacco dealer sells more tobacco than he has reported buying, or when a dealer fails to report a resale of tobacco, it is presumed that the tobacco sold was over-quota tobacco, *i.e.*, tobacco purchased from a producer in excess of that producer's quota." *Id.* at A6. The court further noted that an agency may create such a presumption—which the

court noted was rebuttable under the terms of one of the regulations and under the government's own consistent practice under the other, *id.* at A5 n.4—"as long as there is a rational nexus between the proven facts and the presumed facts." *Id.* at A7.

After examining the predicate and presumed facts "in the[] context of this regulatory scheme," and reviewing the arguments advanced by petitioner, the court of appeals concluded that "the relationship [between the facts] is obviously close," Pet. App. A12, and that petitioner had "failed to demonstrate that the regulatory presumption is irrational or otherwise invalid," *id.* at A13.

Judge Godbold dissented. Pet. App. A14-A29. In his view, Congress had already determined the consequences of a dealer's improper reports by enacting 7 U.S.C. 1373, which provides for *criminal* penalties for, *inter alia*, "failing to make any report or keep any record as required by this subsection." 7 U.S.C. 1373(a). According to Judge Godbold, since Congress had addressed that issue, the Secretary's regulations amounted to an attempt improperly to "assign[] different * * * consequences" to a dealer's reporting violations. Pet. App. A20. In addition, Judge Godbold believed that the regulations had a number of other defects. He stated that they "sweep[] too broadly," *ibid.*, because they assign responsibility to the dealer for the over-quota production. *Id.* at A21-A22. He also believed that there is an insufficiently close relationship between the fact triggering the regulatory presumption (the sale of excess tobacco by the dealer) and the presumed fact (the upstream sale of over-quota tobacco by the producer to the dealer). *Id.* at A22-A24. Finally, in Judge Godbold's view, the regulations are invalid be-

cause they do not expressly provide for rebuttal of the presumption they create. *Id.* at A27-A29.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Petitioner contends (Pet. 11) that, because 7 U.S.C. 1373(a) expressly provides for criminal sanctions for "[a]ny * * * person failing to make any report or keep any record as required by this subsection or making any false report or record," the rebuttable presumptions contained in the regulations "clearly run afoul" of *Commissioner* v. *Acker*, 361 U.S. 87 (1959), and *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Petitioner's contention is mistaken. Initially, although Section 1373(a) does impose criminal sanctions on dealers who fail to satisfy the regulatory reporting requirements, nothing in that provision suggests that a dealer who violates it is thereby immunized from penalties based on other statutory provisions. In this case, the penalty imposed on petitioner was based on 7 U.S.C. 1314(a), which provides that the penalty for an over-quota sale "shall be paid by the person who acquired [the] tobacco." *Ibid.* Section 1314(a) thus requires that a dealer remit the penalty amount for over-quota sales in which he participated. If petitioner failed to satisfy that obligation, he is subject to a civil penalty under Section 1314(a), regardless of whether he may also be subject to the criminal penalty provisions of Section 1373(a).

Section 1314(a) does not expressly address how it may be proven that a dealer has acquired over-quota tobacco. In this case, such proof was provided in accordance with the regulations creating the rebuttable presumptions that a tobacco dealer who sells more tobacco than he has reported buying, or fails to report a resale of tobacco, has participated in over-quota sales. As the court of appeals explained (Pet. App. A9-A12), it is rational to presume, subject to rebuttal, that a dealer who has failed to report purchases of tobacco—or has reported purchasing less tobacco than he sold—has purchased the unreported tobacco from a producer selling in excess of quota. Although that presumption may not always be true, the solution to any potential problem the regulations may pose for an underreporting dealer will always lie in the dealer's hands; he can rebut the presumption by showing that the tobacco had been purchased from a producer selling within his statutorily assigned quota, or from another dealer. Accordingly, the agency validly employed the presumption in determining that petitioner is subject to a penalty under Section 1314(a).

That conclusion is fully consistent with this Court's decision in *Acker*. *Acker* stands for the proposition that, in evaluating the imposition of an administrative penalty, "[t]he first and primary question * * * is whether there is any expressed or necessarily implied provision * * * which authorizes" the penalty. 361 U.S. at 90-91. In *Acker* itself, the Court found that no such provision authorized the Internal Revenue Service (IRS) to impose a statutory penalty for underpayment of estimated taxes upon an individual who had completely failed to file any estimate of tax. The taxpayer's failure to file

such an estimate removed him from the class of people susceptible to being penalized for underpayment of estimated tax, and nothing in the statute thus authorized the IRS to impose the underpayment penalty on him. In this case, by contrast, the imposition of penalties on dealers like petitioner is authorized by Section 1314(a). Accordingly, the Secretary's action and the decision below are consistent with *Acker*.

Nothing in this Court's decision in *Chevron* casts doubt on the penalty imposed in this case. Petitioner relies (Pet. 14-15) on *Chevron*'s admonition that, if "Congress has directly spoken to the precise question at issue," the "agency * * * must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-843. He argues that Congress has spoken to the issue of dealer liability by providing the criminal penalty in Section 1373(a), and that applying the presumption in the regulations at issue in this case is inconsistent with that determination because it has the effect of subjecting dealers to penalties under Section 1314(a) as well.

As we have explained above, petitioner's contention is mistaken because the plain terms of Section 1314(a) provide that liability should be imposed on dealers, and nothing in Section 1373(a) conflicts with that language or otherwise suggests that Section 1373(a) was intended to provide the *exclusive* penalty provision applicable to tobacco dealers. Moreover, Congress expressly directed the Secretary to provide by regulation "for the identification, wherever necessary, of * * * tobacco so as to afford aid in discovering and identifying such amounts of the commodities as are subject to and such amounts thereof as are not subject to marketing restrictions in effect under" the Agricultural Adjustment Act.

7 U.S.C. 1375(a).[4] The regulations at issue in this case were fully authorized by that provision, as well as by 7 U.S.C. 1375(b), which more generally provides that "[t]he Secretary shall prescribe such regulations as are necessary for the enforcement" of the Act.

2. Petitioner also contends that one of the regulations at issue, 7 C.F.R. 725.94(d), is invalid because it "unambiguously fails to provide for rebuttal." Pet. 18 n.2. The critical question, however, is not whether the regulation unambiguously fails to provide for rebuttal, but whether the regulation unambiguously precludes rebuttal. Nothing in the regulation has that effect, and, as the court of appeals pointed out, the Secretary plainly afforded petitioner repeated opportunities to rebut the presumption that over-quota marketing had occurred. Pet. App. A5 n.4. The agency's determination that rebuttal is possible under Section 725.94(d) "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994) (internal quotation marks omitted). Since it is neither plainly erroneous nor inconsistent, the Secretary's interpretation controls. Accordingly, the court of appeals correctly concluded that the applicable regulations created a rebuttable presumption.

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[4] See Pet. App. A12. Petitioner's Appendix omits the following sentence and citation from the court of appeals' opinion, which should include, immediately before the indented quotation at Pet. App. A12:

> Indeed, the statute itself would seem to contemplate this close regulatory relationship between the several stages of the marketing process. 7 U.S.C. § 1375(a) provides:

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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